No. 2634

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

---

CALEDONIAN INSURANCE COMPANY, et al.,

*Plaintiffs in Error,*

vs.

S. W. LEVY,

*Defendant in Error.*

---

## Answer of Defendant in Error to Supplemental Brief for Plaintiffs in Error

---

GOODFELLOW, EELLS, MOORE & ORRICK,

*Attorneys for Defendant in Error.*



*Filed this.....day of November, 1915.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*

THE BLAIR-MURDOCK COMPANY, 68 FREMONT ST., SAN FRANCISCO

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

| | |
|---|---|
| CALEDONIAN INSURANCE COMPANY, et al., *Plaintiffs in Error,* vs. S. W. LEVY, *Defendant in Error.* | No. 2634. |

## ANSWER OF DEFENDANT IN ERROR TO SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

By permission of the Court, this brief is filed in answer to the supplemental brief of plaintiffs in error, filed herein after the argument.

At the top of page 2 of the supplemental brief, it is said that "defendant in error makes the further point " that defendant in error is *in any event* entitled to an " affirmance of the judgment on his first count, etc." To this it need only be said that we believe—and think we have shown in our brief—that plaintiff is entitled to an affirmance of the entire judgment.

## I.

In the first subdivision of the brief, it is argued that no special findings of fact were required, in order that the sufficiency of the facts to sustain the general finding may be reviewed. The various reasons urged in support of this conclusion will be considered in the order in which they are stated in the brief.

It is first said that the evidence was not in conflict. Strictly speaking, however, this is not so. For example: Mr. Conroy testified that no demands for the thousand dollars were made during the second year (Tr., p. 82); whereas, Mr. Wren gave testimony which, it was argued by the defendants in the court below, showed that demands were made during the second year. (Tr., p. 74.)

But even if the evidence were not in conflict in any respect, it is nevertheless well settled that the rule invoked by us would be applicable. As stated by Mr. Justice Brewer in *Lehnen* v. *Dickson*, 148 U. S. 77, 13 Sup. Ct. 484:

> *"The burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts; and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the*

*case in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."*

On page 4 of the supplemental brief, defendants urge that the "case was tried in the court below, and sub-" mitted practically upon an agreed statement of fact." This, however, was never the intention either of the trial court or of counsel for plaintiff. On the contrary, the offer of plaintiff's counsel, and the order of the court, was that the case should be submitted upon "the *evi-*" *dence* taken at the former trial thereof, as shown in " the reporter's transcript of such trial, supplemented " by such additional testimony as should be offered." (Tr., pp. 67, 68.) There was no agreement either as to the probative or ultimate facts. And the offer and order were made merely—as was understood by all at the time—for the purpose of expediting the submission of the evidence to the trial court for its decision as to the ultimate facts which followed therefrom and as to the law applicable thereto. In lieu of calling the witnesses to give their testimony *viva voce*, plaintiff's counsel offered, and the court in effect ordered, that the testimony given by the witnesses upon the first trial might be considered again given by them, and that in addition, the parties might submit further testimony. And such additional testimony was introduced by plaintiff. (Tr., pp. 80-83.) Will it be said that there was any agree-

ment as to the truth of the latter? And if not, how can it be said there was any agreement as to the former?

Again it was the *evidence, as shown in the reporter's transcript at the former trial,* together with the additional testimony which was offered, upon which the case was submitted. If, therefore, there was any agreed statement of facts—which we deny—it is evident that it is to be found in the reporter's transcripts of the two trials, neither of which was filed or is before this Court. In lieu thereof, there is a bill of exceptions made up long after judgment was entered. Defendant's counsel, therefore, have yet to explain how, even upon their own theory, the bill of exceptions can be said to be an agreed statement of facts. That the agreed statement must not only contain a statement of all of the ultimate facts and be stipulated to by the parties before the submission, but must also be filed in the court below, are propositions which are fully sustained by the authorities. As said by Judge Van Devanter, in *U. S.* v. *Sioux City Company,* (C. C. A. 8th Cir.), 167 Fed. 127, speaking of a special finding—and the same thing is true of an agreed statement—

> "The special finding contemplated by the statute is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, *and is spread at large upon the record as part thereof in like manner as is such a verdict.*"

That there was *actually* no agreed statement in the case at bar is too clear for argument; for, as we have

shown, there was no agreement whatsoever as to the facts. It is equally clear that even had it been stipulated by the parties that the reporters' transcripts of the two trials, or the bill of exceptions to be thereafter prepared, might be deemed an agreed statement of facts, and even had the transcripts or bill, as the case may be, been filed in the court below before submission, neither would have been the equivalent of an agreed statement within the authorities, for the reason that neither contains any findings or statement whatever as to the *ultimate* facts.

In *Mutual etc. Assn.* v. *Du Bois,* 85 Fed. (C. C. A. 9th Cir.) 586, the case had been tried upon a so-called "agreed statement of facts." The statement, however, was not a statement of the *ultimate* facts, but a mere agreement as to the evidence. The court held that there was nothing presented which it might consider. Mr. Justice Morrow, delivering the opinion of this Court, said:

> "The agreed statement of facts is therefore merely a report of the evidence; and whether it appears in the opinion of the court or in the bill of exceptions, it cannot be deemed a special finding."

Quoting from the opinion of Judge Lurton in *Insurance Co.* v. *Hamilton,* 63 Fed. 588, the court said:

> *"We did not and cannot regard the so-called 'agreed statement of facts' found in this record as in any sense the equivalent of a special finding of facts. It does not purport to be a statement of the ultimate facts, but a mere agreement as to the evi-*

*dence to be submitted to the court as bearing upon the issues presented by the pleadings. To treat the evidence thus submitted as an agreed statement of facts, equivalent to a special finding of facts, would require this court, on a writ of error, to examine the evidence as it was submitted to the court below, and confound all the distinctions which distinguish an appeal from a writ of error. The bill of exceptions sets out the numerous applications, notices, letters, policies, charters, and by-laws therein referred to as having been read upon the hearing. What ultimate facts are proven by all this evidence are not shown by the agreement itself, nor is there any special finding of facts based upon all this evidence by the trial judge. An agreed statement of facts which will be accepted as the equivalent of a special finding of facts must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found is not within the rule stated in Supervisors* v. *Kennicott, 103 U. S. 554.*"

(Italics throughout this brief are our own.)

A writ of *certiorari* was refused by the Supreme Court (171 U. S. 688).

In *Wilson* v. *Merchants etc. Co.,* 183 U. S. 127, 22 Sup. Ct. 58, a statement of facts had been agreed to, which, in addition to containing a statement of some of the ultimate facts, found the evidentiary facts from which the ultimate facts might have been found. In holding that such a statement could not supply a special finding of facts, the court said, by Mr. Justice Peckham:

"As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the Court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case, the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. *Norris* v. *Jackson,* 9 Wall. 125, 19 L. Ed. 608.

"In this case the finding is general, and, strictly construing the statute the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Wayne County Supers* v. *Kennicott,* 103 U. S. 554, 26 L. Ed. 486. *But as such equivalent, there must of course be a finding or agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred.*

"An exception to a general finding of the court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during the trial in order to permit a review thereof. *Mercantile Mut. Ins. Co.* v. *Folsom,* 18 Wall. 237, 21 L. Ed. 827.

> "Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts, together with certain other facts evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. *In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.*"

In *Raimond* v. *Terrebonne Parish,* 132 U. S. 192, the parties had made what they called a "statement of fact," and the cause was submitted to the trial court upon this statement. The statement consisted of the instrument sued on, a reference to the plaintiff's deposition on file, an abstract of the testimony of another witness for the plaintiff, and a statement of the proof offered by the defendant. The Supreme Court held that since this statement did not determine the ultimate facts, it could not be deemed the equivalent of a special finding of the facts so as to enable the court to review the sufficiency of the evidence or the legal conclusions upon which the judgment was based. Said the court, speaking through Mr. Justice Gray:

> "By the settled construction of the acts of Congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the Circuit Court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ulti-

mate facts, or from which they may be inferred. *Burr* v. *Des Moines Co.,* 1 Wall 99; *Norris* v. *Jackson,* 9 Wall. 125; *Martinton* v. *Fairbanks,* 112 U. S. 670.

"In short there is nothing in the present case, which can be called, in any legal or proper sense, either a statement of facts by the parties, or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it."

In *Glenn* v. *Fant,* 134 U. S. 400, Mr. Justice Fuller, delivering the opinion of the Supreme Court, said:

"What is styled here an 'agreed statement of facts' is an agreement as to certain matters, and that the parties might refer to and rely upon any and all grounds of action or defense to be found in two voluminous exhibits X and Y, being the records of two equity causes in other courts, including all the pleadings and evidence, as well as the orders and decrees therein. The effect of some of that evidence and of the conclusions of fact to be drawn from it is controverted. It is impossible for us to regard this stipulation as taking the place of a special verdict of a jury, or a special finding of fact by the court, upon which our jurisdiction could properly be invoked to determine the questions of law thereon arising."

That an opinion of the court, even, will not take the place of a special finding, see:

*Bishop, etc., Co.* v. *Baker, Etc., Co.,* 139 U. S. 222;

*U. S.* v. *Sioux City, etc., Co.* (C. C. A. 8th Cir.), 167 Fed. 127;

*Kentucky, etc., Ins. Co.* v. *Hamilton,* 63 Fed. 93;
*Yorks* v. *Washburn,* 129 Fed. 568;
*Clapman* v. *Bowen,* 207 U. S. 91.

We submit, therefore, that the record in the present case does not fill the requirements laid down by the Supreme Court and by this Court for an agreed statement of facts which will take the place of a special finding of facts. As we have pointed out, there was, in the first place, no agreement whatever as to the facts, either probative or ultimate. In the next place, the statement, if any was made, is shown to have been as to the *evidence,* which is to be found in the reporters' transcripts of the two trials, which are not before the court. And in the last place, even had the two requirements last referred to been fulfilled, the record contains a mere collection of evidence, with no finding upon any ultimate facts. The attempt, obviously, is to make a bill of exceptions take the place of a special finding, upon the claim that the bill is the equivalent of an agreed statement of facts. That this can be done is well established.

*St. Louis* v. *Western Union, etc., Co.,* 166 U. S. 390;
*Corliss* v. *Pulaski County,* (C. C. A. 7th Cir.) 116 Fed. 291.

Before leaving this branch of the subject, we desire to add to the citations found on page 10 of the brief for defendant in error the last decision of this Court upon the point there under consideration:

*Phoenix Securities Co.* v. *Dittman,* (C. C. A. 9th Cir.) 224 Fed. 892.

Passing, now, to the authorities cited in the supplemental brief upon this point, it is apparent from even the most casual examination of them that they lend no support to defendants' position.

*Southern Railway Co.* v. *Atlantic Bank,* 50 C. C. A. 558, 56 L. R. A. 546. (Supp. Brief, p. 5). On page 551 (56 L. R. A.), the court said that the questions were: "(1) Are the pleadings of the plaintiff sufficient to support the judgment; (2) Do the facts *found* by the trial judge support the judgment." The court had filed written opinions in the case and had caused an order to be entered "that the opinions rendered by the court in the above stated cause be, and the same are hereby, made a part of the record in said cause." The Circuit Court of Appeals in effect held that even this did not constitute a special finding of facts within the rule, stating:

> "It cannot be that the many pages of record matter to which this certificate refers are to be received and considered by us as the special findings of fact, and it may well be doubted if, under the conditions in which the case was tried in the Circuit Court, it is our duty to thresh through all this matter and winnow out the special findings which it may contain. If so, it is very difficult to distinguish between a review of such a judgment on writ of error and a review on appeal of a decree passed in equity."

In *Erkel* v. *United States,* 169 Fed. 623, the judgment was affirmed for the reason that the case was tried by the court without a jury, and there was no written stipulation waiving a jury. The opinion of Judge Gilbert, however, clearly lays down the rule relied upon by us. As said by him:

> "It is well settled that no question of law can be reviewed on error except those arising on the process, pleadings or judgment, 'unless the facts are found by a general or special verdict, or are admitted by the parties upon a case stated.'" (624).

In *Mutual Life Insurance Co.* v. *Kelly,* 114 Fed. 271, as shown by the opinion:

> "The cause was submitted to the court upon an agreed statement of facts signed by counsel for the respective parties, filed and made a part of the record, and that no other evidence whatever was heard at the trial."

*City of Mankato* v. *Barber, etc., Co.,* 142 Fed. 333. The sentence in Judge Adams' opinion reading, "whether there is any substantial evidence to support "it" (p. 333) is quoted in the supplemental brief as laying down a rule contrary to that contended for by us. We confess that it is not entirely clear to us what was meant by this language. However, it is abundantly clear from the citations which may be found on page 333 of the opinion following the above quotation, that the court did not intend to lay down any rule opposed to that relied on by us. For example, in *Yorke* v. *Washburn,* 129 Fed. 566—one of the cases cited in the opinion

—the court, speaking through Judge Van Devanter, says that "whether the finding be general or special, it has the same effect as the verdict of the jury, and in the manner in which it is given is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence."

In *Supervisors* v. *Kennicott,* 103 U. S. 554, cited on page 5 of the supplemental brief, there was an agreed statement of facts spread on the minutes.

This was the case, also, in *Fellman* v. *Royal Insurance Company,* 185 Fed. 691, and in *Hipple* v. *Bates County,* 223 Fed. 23, where the court said that the agreed statement of facts "contained the ultimate facts " upon which the case depended."

Neither of the criminal cases cited at the bottom of page 5 (163 U. S. 638; 197 U. S. 207) seem to us to have any bearing on the matters in controversy in this case. The question here involved does not turn upon any rule of court, *but upon a statute of the United States.* And the Supreme Court has held that parties will be held to a strict compliance with the provisions of the statute.

*Flanders* v. *Tweed,* 9 Wal. 425.

At the bottom of page 4 it is said that "it is apparent " that the intention of both parties was to submit the case " on the entire record of the previous trial. This obvi- " ously was meant to include, not only the oral testi- " mony, but the rulings of the court and the exceptions " reserved." A sufficient answer to this statement would

seem to be that the bill of exceptions shows no rulings of the court, and no exceptions by defendants.

On page 9 of the supplemental brief, it is urged that the trial court erred in overruling the demurrer to the complaint, and in this connection it is said that "an examination of the record discloses that the complaint sets forth the material facts relied on by Levy to support a recovery." (p. 9.) This is entirely true, and these facts, as shown in our brief on file herein, undoubtedly state a cause of action. The facts stated, however, are *ultimate* facts, and since the demurrer confesses them, the court is relieved from a consideration, not only of the question most discussed in defendants' brief herein, *i. e.* whether the evidence establishes a repudiation of the contract by defendant at the end of April, 1907, and during the remainder of the term of the contract, but also, we think, of every other question which is seriously argued in defendants' briefs.

As bearing upon the issue of "repudiation," we respectfully direct the attention of the court to the allegations of the complaint that the defendants at all times after April, 1907, "persisted in claiming and asserting " that the said contract had been rescinded and was no " longer in force or effect, and at all times continued to " repudiate the same on their part, and refused to be " bound thereby, etc." (Tr., p. 12); and at all times until the decision by the Supreme Court of California, hereinafter referred to, the defendants persisted in claiming and asserting that said agreement was no longer in force or effect, and that they would not per-

form on their part any of the obligations thereof, and wholly repudiated the said agreement and refused to perform the same, in whole or in part." (Tr., p. 5.) Since the demurrer concedes the truthfulness of these allegations, as well as that of all others in the complaint, we are unable to see how defendants can hope to satisfy the court that any error was committed in the overruling of the demurrer.

On page 14, it is again urged that "defendant in error was called upon in the trial court to elect whether he would proceed upon the theory of performance or nonperformance, and thereupon, after full consideration, he had elected to proceed upon the theory of performance, etc." "* * * In other words, he, in effect, under the advice of counsel, struck out from his complaint all but his cause of action based upon his claim of performance * * *." Counsel have unintentionally failed to state the matter with entire accuracy. (See in this connection, Brief for Defendant in Error, p. 40.) Be this as it may, however, plaintiff clearly was not estopped from proceeding at the last trial upon the theory upon which he did.

*Agar* v. *Winslow,* 123 Cal. 590;
*Brown* v. *Fletcher,* 182 Fed. 973.

At the bottom of page 16 of the supplemental brief, it is said "that both the trial court in the opinion which it "has rendered, as did this court upon the former ap- "peal, have looked upon the question for decision as "one of law and not calling for the decision of any con- "flict in the evidence is apparent and should be con-

"clusive upon the point which we have been discuss-
"ing." We think sufficient answer has already been made to this contention. There could be no decision as to the law, excepting upon and in respect of certain ultimate facts, and these, as already stated, are all involved in and found in plaintiff's favor by the general finding in favor of plaintiff. Moreover, as stated in *Boardman* v. *Toffey*, 117 U. S. 272, "the general finding prevents all inquiry by us into the special facts *and conclusions of law* on which that finding rests."

II.

In the second subdivision of the supplemental brief, it is urged that the plaintiff is not entitled to recover under the first count, for the reason that at the last trial "no new or different testimony was offered to sup-
"port this count." (p. 17) This question, however, is not before the court, for, as pointed out in our brief, neither the facts nor the conclusions of law upon which the general finding in favor of plaintiff was based, nor the amount of the judgment, are open to review upon this record. (Brief for Defendant in Error, pp. 9-11, 50.) Since no special findings were made or requested, neither the question how the judgment of the lower court was arrived at or what elements and amounts entered into it, or under what counts it was rendered, is involved. As we understand the decisions of the Supreme Court and of this Court, under the circumstances shown by the record in this case, the appellate court will not, and cannot, investigate whether any re-

covery was allowed under any particular count, nor review the process by which the court below reached its conclusion that the plaintiff was entitled to judgment herein. On the contrary, "the general finding prevents "all inquiry by us into the special facts and conclusions "of law on which that finding rests." (*Boardman* v. *Toffey*, 117 U. S. 272.)

Notwithstanding all questions as to the amount of the judgment and as to the facts and conclusions of law upon which it is based are foreclosed by the general finding made by the court below, and therefore, as we understand, the questions whether any recovery was allowed under the first count, or whether the entire recovery was allowed under other counts, are not before the court,—we propose to show that assuming that such inquiry is open, the plaintiff was not foreclosed by the previous decision of this Court. And, first of all, it may be remarked that the defendant in error does not admit that the evidence at the two trials was identical, or substantially identical, as claimed by plaintiffs in error. On the contrary, the record shows that at the last trial additional and important evidence was introduced. (Tr., pp. 80-83.)

*Wallace* v. *Sisson*, 114 Cal. 42.

Be that as it may, it is clear, we think, that the opinion on the former appeal establishes no principle which precludes the plaintiff from recovery under the first count. Upon the former appeal, the court held that the instruction which is quoted at page 412 of 199 Fed. was erroneous, and reversed the judgment. Counsel,

however, did not argue, and the court did not consider, whether a *portion* of the judgment could not be sustained upon the theory upon which the case was submitted to the jury; but it being obvious, upon the principle laid down by the court, that the judgment must be reversed, the *entire* case was sent back for a new trial. Upon the principle laid down by this court in its opinion, it was clear that the judgment could not be sustained under the instruction of the trial court to the jury that plaintiff must recover, if at all, upon the theory of performance during the second year. It was, therefore, not necessary to determine—and the court did not determine—anything as to plaintiff's right to recover under the special circumstances affecting the claim for salary for the month of April, 1907. That the court did not intend to pass upon this question, we think is very clear from the opinion.

If there is one principle connected with the doctrine of the "law of the case" that is undisputed, it is that no matter not *expressly* decided upon the former appeal is concluded. In *Wickson* v. *Devine,* 80 Cal. 388, Judge Beatty said—and the thought is repeated in almost identical language in the case of *Allen* v. *Bryant,* 155 Cal. 256—that "the doctrine of the law of the case has " nothing to commend it to the favor of the court, and " its application would not be extended beyond the cases " in which it had been held to apply."

In *Mutual Life Ins. Co.* v. *Hill,* 24 Sup. Ct. 539, Mr. Justice Brewer, delivering the opinion of the Supreme Court, distinguished between the case where, upon a

former appeal, the judgment had been reversed, and where, upon such appeal, it had been affirmed, stating: "The rule is that a judgment of reversal is not neces- "sarily an adjudication of the appellate court of any "other than the questions *in terms discussed and de- "cided.*" "As applied to judgments of reversal where "new trials are ordered," said the Circuit Court of Appeals for the sixth circuit, in the case of *Taenzer & Company* v. *Chicago Railway Co.*, 191 Fed. 547, "the "rule of conclusiveness is confined to questions actually "decided."

See, also,

*Sneed* v. *Osborn*, 25 Cal. 629.

Certainly, in the case at bar, it cannot be said that any of the legal propositions arising in this connection, and which are discussed in our brief herein (pp. 32-36), are either "discussed or decided." On the contrary, there was no reference made to them in either the briefs or in the opinion of this Court. For these reasons, we respectfully submit that the "law of the case" does not preclude this Court from investigating the merits of any of the points urged by us to sustain the judgment under the first count. (Brief for Defendant in Error, pp. 32-36.)

Moreover, the doctrine of the law of the case applies "only to principles of law involved in the case and not "to mere questions of fact." (*Mitchell* v. *Davis*, 23 Cal. 383; *Wallace* v. *Sisson*, 114 Cal. 42.) "If this court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the court

below and cannot prejudice the parties, where a new trial is had. It is upon question of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact." (*Sneed* v. *Osborn,* 25 Cal. 629, approved in 114 Cal. 43.)

Parties are never concluded by a recital of the facts in the opinion, and upon a new trial, after reversal, it is the duty of the trial court to investigate and determine the facts upon its own responsibility. The trial court, therefore, was not concluded by the statement made in the opinion on the former trial, that plaintiff did not turn over to the companies the premiums "dur- " ing the second year, but, on the contrary, *from April " 1st, 1907,* to April 1st, 1908, deducted and retained " from all of such premiums a commission, etc." (199 Fed. 412) The testimony given by Mr. Conroy at the last trial conclusively showed that the premiums were not due until between 45 and 60 days. The trial court, therefore, was at liberty to determine the fact in this regard in accordance with the evidence before it, unembarrassed by anything said thereon in the opinion.

For the reasons stated, it is respectfully submitted that the "law of the case," as determined upon the former appeal, does not preclude recovery under the first count. Since this brief is filed for the purpose of answering the new authorities and contentions of defendants, set forth in their supplemental brief filed after the argument, we do not consider it appropriate to reargue here any of the several points relied upon by us to establish plaintiff's right to recover under the first

count. And we, therefore, respectfully submit this branch of the argument upon the argument made in our brief, pages 32 to 36.

GOODFELLOW, EELLS,
MOORE & ORRICK,
Attorneys for Defendant in Error.